STRAITS SETTLEMENTS REPORTS.

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[APPELLATE JURISDICTION]
[PRIVY COUNCIL]
LORD ATKIN, LORD ALNESS AND SIR SIDNEY ROWLATT.

December 3, 1934.

S. V. S. CHOKALINGAM CHETTIAR .. Plaintiff
v.
C. KASIVISVANATHAN CHETTIAR & ANOTHER.....Defendants

[MALACCA CIVIL SUIT No. 36 of 1925]
[PRIVY COUNCIL APPEAL No. 33 of 1933]

Ordinance No. 56 (Limitation) S. 9—"trust for a specific purpose."

An administrator of the estate of an intestate or an attorney of such an administrator is "a person in whom property has become vested in trust for a specific purpose" within the meaning of S. 9 of Ordinance No. 56 (Limitation).

Khaw Sim Tek v. *Chuah Hooi Gnoh Neoh*, (1922) 1 A.C. 120, discussed and distinguished.

Appeal from the Judgment of the Court of Appeal of the Straits Settlements. That Judgment is unreported. The appeal came on for hearing before the Privy Council on the 15th, 16th, 17th, 18th and 19th October, 1934, before Lord Atkin, Lord Alness and Sir Sidney Rowlatt.

Vaisey, K.C., and *Cecil W. Turner* for Appellant (Defendant).

Sir Gerald Hurst, K.C., and *C. D. Myles*, for Respondent (Plaintiff).

Cur. Ad. Vult.

The Judgment of the Board was delivered by

SIR SIDNEY ROWLATT.—This is an appeal from the judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Settlement of Singapore), dated the 14th September, 1931, setting aside the judgment of Mills J., delivered on the 25th October, 1930, and giving judgment in favour of the respondent.

The suit was begun by writ issued on the 9th March 1925 by S. Muthuraman Chettiar, suing as the administratrix *de bonis non* of one S. V. S. Supramaniam Chetty deceased (herein called "the Intestate"). The respondent was substituted as plaintiff, suing in the same capacity, by an order dated the 26th September 1928.

As originally framed the suit was against E Kong Guan. The appellant was added as a further defendant by an order dated the 7th September, 1925. The claim against the appellant, with which alone this appeal is concerned, was to make accountable for certain shares in a rubber estate called Leong Watt Hin Rubber Estate (afterwards converted into 1,250 shares in Leong Watt Hin Estate, Ltd.) and the primary question was whether such shares, which passed into the hands of the appellant under the circumstances to be hereinafter examined, were the private property of the intestate or the property of a firm in which he was a partner, his share therein having been subsequently acquired by the respondent. On this issue there were concurrent findings of fact in favour of the respondent which their Lordships intimated at the hearing that they would not disturb and the main question left is whether the claim was barred by limitation. It is so barred unless the property in question became vested in the respondent in trust for a specific purpose within the meaning of section 9 of Ordinance No. 56 (Limitation) of the Ordinances of the Straits Settlements.

For some time prior to 1912 the intestate had been the managing partner in a firm of money lenders carrying on business at Malacca under the style or "vilasam" of P.M.S. He also carried on a private business on his own account under the vilasam of S.V.S. His interest in P.M.S. was in the form of a one-half share in a Hindu undivided family which owned a quarter share in P.M.S. The family vilasam was V.E.S.

Before 1912 the intestate had become interested with Guan, the 1st defendant, in the rubber estate already mentioned, which it is convenient to call, (as was done in the argument), "L.W.H.".

In the early part of 1912, as the result of transactions which it is unnecessary to relate in detail, the position was as follows: The land was in Guan's name, but belonged to Guan and two other Chinese associated with him for the purpose of this venture. Guan's interest in it was to the amount of 13/20, afterwards changed to 13/22, the other two holding, after the alteration, 6/22 and 3/22 respectively. The intestate, as subpartner with Guan, was entitled to 5 of his 13 parts or shares. About August, 1912 the intestate, being in bad health, left Malacca for India, where he died on the 9th December of that year, leaving a widow and a son, Shanmugan, and two daughters. On the 2nd May, 1913, the widow gave a power of attorney to one Kadappa to apply for letters of administration in the Straits Settlements and these were granted to him on the 1st August, 1913. Kadappa was at this time managing P.M.S. as a paid agent.

According to the evidence of Guan, Kadappa came to Malacca about May, 1913, and discussed with him the intestate's affairs, including the L.W.H. shares. In his examination in chief, Guan did not say whether this was before or after the

grant of letters of administration. In his cross-examination, he said it was before. In his re-examination he said Kadappa told him later that he had taken out the grant. The substance of the conversation according to Guan's evidence was that Kadappa told him to wait for the arrival of the intestate's son (Shanmugan). In cross-examination he said "Kadappa told me to hand the shares over to Shanmugan and the Manager of P.M.S." In re-examination he gave Kadappa's words as being "Then" (referring to Shanmugan's arrival) "we can settle." It was suggested in the argument before their Lordships on behalf of the appellant, on the strength of this evidence, that Kadappa had, by these words spoken to Guan, administered this asset and that was the end of the matter. Their Lordships are unable to take this view. Apart from the doubt as to the date of the conversation, it does not appear to their Lordships that what took place amounted to a final dealing with the asset from the administrator's point of view.

In 1913, the appellant, who was already a partner in P.M.S., went to India and acquired the share of the intestate's family in that firm. He was now the predominant partner and in 1914 returned to Malacca and took over the management. On the 5th April, 1914, Kadappa gave a power of attorney to the appellant to act in the administration of the intestate's estate and as his attorney and in his name to perform a numerous class of acts, being those necessarily called for in an administration. The power gave the appellant power to appoint a substitute. Kadappa left Malacca for India in 1914 and died there in 1917. It was held at the trial of the present suit that this power of attorney was invalid. No argument founded on such a contention was seriously pressed on the hearing of this appeal and in view of the appellant's actions, the question is an academic one.

In 1915, Shanmugan came to Malacca. It appears that according to the Hindu law applicable to the estate of the intestate Shanmugan or the son was beneficially entitled to the whole, subject to maintenance of the widow and daughter till marriage. In the colony, however, the estate vested in the administrator, who alone could deal with it. This being the state of affairs, the appellant and Shanmugan on the 16th July, 1915, made an agreement evidenced by receipts exchanged between them, that they should divide the intestate's 5 shares in L.W.H. equally, each taking 2½ shares. The appellant was—to quote the language of both receipts which is in this respect the same—"to take all actions to obtain agreement, &c.," and he was to account to Shanmugan for his half. At the time of making this agreement, the appellant must have known that these shares belonged to the intestate's estate which he was administering.

Following on this arrangement of the 16th July, 1915, a meeting took place between Guan, the appellant, Shanmugan and one P. V. Palaniappa Chetty, when the three latter concurred in requesting Guan, firstly, to hand over to Shanmugan the scrip of certain shares which had belonged to the intestate, but with which this appeal is not concerned, and secondly, as regards the 5 shares in the L.W.H. property, that they should be transferred to P. M. S. Kasi, that is, to the appellant under the vilasam of the partnership P.M.S. From that time, Guan said that he considered the owner of these 5 shares to be P.M.S.

In 1915, the property L.W.H. began to yield profits and there was a distribution among the partners in October of that year. The proportion attributable to the 5 shares of the intestate was paid to the appellant as P.M.S. Kasi, who also received all subsequent profits and, when the property was transferred to a company, all the dividends on the shares representing the intestate's interest.

On the 5th June, 1916, the appellant purported to exercise the power of substitution expressed to be conferred upon him by the power of attorney given to him by Kadappa and appointed one Muthiah Chettiar as his substitute for the purpose of the administration of the estate of the intestate.

There was evidence that, notwithstanding this substitution, and even after the death of Kadappa which occurred on the 24th November, 1917, terminating beyond all question the power of attorney given by him, the appellant acted as Kadappa's attorney and made an application to the Court in that character in connection with the sale of some land. In view of their Lordships, however, a termination of the appellant's agency under power of attorney whether in 1916, by the substitution of Muthiah or in 1917 by the death of Kadappa, does not affect the situation, inasmuch as the appellant had already, namely, at the interview with Guan and Shanmugan in 1915, been recognized by Guan as the person to whom he was to account for the intestate's interest in the L.W.H. property. In pursuance of that arrangement (so Guan deposed), Guan subsequently, namely, by an indenture of the 5th July, 1916, formally transferred that interest to the appellant.

At the end of 1917, a few days before the death of Kadappa, the L.W.H. property was transferred to a Company, called the Leong Watt Hin Estate Co., Ltd., and the appellant received, by direction of Guan, 1,250 shares in that Company as representing the intestate's interest.

Although by the agreement entered into with Shanmugan in July, 1915, the appellant had agreed to hold one half of the 5 shares for the account of Shanmugan, he did not account to him for any part of the profits he received. Early in 1924, Shanmugan came from India to Malacca and asked the appellant for the money due to him on the 2½ shares. The appellant told him that his partners in P.M.S. claimed all the 5 shares as belonging to that firm and he suggested that Shanmugan should sue the partners. In the end, Shanmugan accepted from the appellant $18,000 and released his claim. This according to the appellant's evidence was a private transaction of his own with which his partners in P.M.S. were not concerned.

On the 1st November, 1924, the intestate's widow gave a power of attorney to one Muthuraman Chettiar to apply for letters of administration to the estate of the intestate and on the 20th December, these were granted to him *de bonis non.*

On the 9th March, 1925, Muthuraman commenced the present suit against Guan as sole defendant, the appellant being added as second defendant by order dated the 7th September, 1925. Later in the proceedings the widow having died, the respondent took out letters of administration *de bonis non* as attorney of the daughters and was substituted as plaintiff.

By the statement of claim delivered on the 10th February, 1926, the plaintiff claimed as against the appellant a transfer of the 1,250 shares in the L.W.H., Ltd., an account of the dividends received and damages. There was no allegation of fraud. The appellant, by his defence delivered on the 20th June, 1926, pleaded limitation and by supplemental defence delivered on the 11th October, 1926, pleaded *inter alia,* that the right to the 5 shares in the original L.W.H. venture now represented by 1,250 shares in L.W.H., Limited, had been the property of P.M.S. and further, that any question regarding them had been settled by the agreement of the 16th July, 1915. On the 12th October, 1926, he served a third party action on Shanmugan, claiming to be indemnified by him against the plaintiff's claim by virtue of the arrangement in 1918 by which the appellant had bought out Shanmugan for $18,000.

In 1927, Shanmugan commenced an action in India against the appellant, claiming the 1,250 shares in L.W.H., Ltd., and alleging that the agreements of 1915 and 1924 were obtained from him by misrepresentation and fraud. He raised the same contention in his pleading, delivered on the 6th February, 1929, as third party in the present action. The suit in India is still pending. The Judge's notes at the trial of the present suit contain a statement that it had "been stopped pending this present case," but whether it has been formally stayed does not appear.

The suit was tried before Mills J. in September and October, 1930. No oral evidence was called for the plaintiff, the present respondent. For the defendants oral evidence was given by, among others Guan and the appellant. At the close of the case of the second defendant (the present appellant) his counsel admitted that he could make no case for indemnity against the third party Shanmugan and the Judge ruled there and then that the third party claim be dismissed. Shanmugan was never called to substantiate his charges of fraud. Nor had his counsel put those charges to the appellant on cross-examination.

On the 25th October, 1930, Mills J. delivered a written judgment in which he found that the 5 shares in the L.W.H. venture were the private property of the intestate. As regards the responsibility of the appellant for the L.W.H. shares, he dealt with the matter as follows:— He held that the power of attorney from Kadappa to the appellant was void, as not authorised by the power of attorney given by the widow to the former and that the appellant, though accountable for the shares, was so only as an alienee without value given. He held, therefore, that the suit against him was barred by limitation not having been brought within six years from the 15th July, 1915. He was of opinion that the appellant, in dealing with the shares on that date, was not acting as a trustee nor was he in the position of a person receiving trust property and dealing with it in a manner inconsistent with trusts of which he was cognizant, because he did not receive the trust property as such, but throughout the negotiations which culminated in the arrangement of the 16th July, 1915, acted solely in his capacity as partner and manager of the firm P.M.S. and supported the claims of the firm in opposition to the claims of the deceased man's estate. The learned Judge said that he confined himself to findings absolutely necessary for the determination of the issue in order that the parties to the Indian litigation might not be embarrassed by comments or *dicta.*

The respondent appealed to the Court of Appeal and the appellant cross-appealed against the dismissal of his third party claim against Shanmugan. The cross appeal was, however, abandoned by counsel and Shanmugan was released from the proceedings in the course of the arguments. Shanmugan is not a party to the present appeal.

The learned Judges in the Court of Appeal concurred with the finding of the trial judge that

the interest in the L.W.H. venture was the private property of the intestate, but held that the appellant, in dealing with that interest, had acted as a trustee by virtue of the power of attorney given to him by Kadappa and that he was not protected by limitation.

The learned Judges further expressed the opinion that the appellant had been guilty of fraud at every stage of his transactions with the family of the intestate. The order of the court directed an account of all moneys received by the appellant or his agents in respect of the L.W.H. shares and an account from the 20th November, 1917, of all moneys received or which ought to have been received by the appellant or his agents in respect of the 1,250 shares in the L.W.H. Company and an enquiry to ascertain what had been the highest value, which a share in the L.W.H. Company had reached prior to the date of the judgment. The court further directed that in taking the account, the appellant should be debited with punitive interest at the rate of 6 per cent. per annum. It was further, by consent of the third party, declared that the appellant was entitled to set off to the extent of Shanmugan's interest, the $18,000 paid to the third party under the arrangement of the 7th January, 1924, against what should be found due from him. Further consideration was adjourned with liberty to apply.

Upon the question of limitation, their Lordships agree with the conclusion arrived at by the Court of Appeal.

The point turns upon section 9 of Straits Settlements Ordinance No. 56 (Limitation) which is as follows:—

> "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal personal representative or assigns, not being assigns for valuable consideration, for the purpose of following in his or her hands such property, shall be barred by any length of time."

The cardinal fact in the case is that the appellant in dealing with this asset of the intestate's estate acted in the character of attorney to the administrator. The arrangement between the appellant and Shanmugan on the 16th July, 1915, was entered into to deal with the question whether the interest in the L.W.H. venture had been the intestate's private property, as Shanmugan was alleging, or not. To any settlement of that question the legal personal representative of the intestate was a necessary party. Shanmugan could not bind the estate and unless it was to be bound by the participation in the transaction of the appellant in the character of attorney for the administrator, that transaction would not furnish a title enabling the appellant to obtain from Guan, as he did, first an assignment of the intestate's interest in L.W.H. and afterwards the shares in the limited company.

What took place, therefore, was a verbal assignment by the appellant, as attorney of the administrator, to himself, of property known to be his principal's. He was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator. This is not a case in which a stranger has possessed himself of trust property under circumstances which make him bound by the trust and in which it is then necessary to inquire into his exact position with reference to the section under discussion or to the English doctrine of express trusts. The appellant here dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him. The position is the same as if the administrator himself had vested the property in the appellant for the purposes of the administration instead of the appellant vesting it in himself by virtue of his powers as attorney. In the course of the arguments, their Lordships were necessarily referred to the decision of the Court of Appeal in England in *Soar* v. *Ashwell*, (1893) 2 Q.B.D. 390. Whatever limits may have to be observed in the application to the construction of this section in the Limitation Ordinance of the Straits Settlements of the English decisions as to express trusts, the reasoning of the M.R. and Bowen, L.J., in the case afford ample support for the particular step in the present argument which consists in referring the possession of the appellant to his antecedent fiduciary capacity.

It remains to consider whether the purpose for which the property became vested in the appellant was specific. If he is regarded in the light of a trustee for the administrator, the answer is obviously in the affirmative. But even if it was to administer the estate and account for the residue to the next of kin, the purpose was also specific. It was suggested in the argument on behalf of the appellant that the judgment of this Board delivered by Lord Buckmaster in *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*, (1922) 1 A.C 120, was an authority for the broad proposition that distribution under an intestacy is never a specific purpose. Their Lordships are not of that opinion. They concur in the explanation of that judgment given in *Lam Kim Sang* v. *Cheang Kok Sang*, (1929) S.S.L.R. 62, namely, that it only deals with the case where a specific trust has been declared on its face exhausting the fund, but, that

trust being void in law, the fund has to be dealt with as upon an intestacy in contradiction of the purpose named.

There remain certain subordinate questions. It is unfortunate that to bring Shanmugan into the suit, recourse was had to the misconceived procedure of a third party notice. The position was that if as between the appellant and Shanmugan the arrangements of the 16th July, 1915, and the 7th January, 1924, stand, the appellant has an equitable defence to the extent of the sum to which Shanmugan will be beneficially entitled out of the money for which the appellant is accountable. If, on the other hand, those arrangements are avoided for fraud, there is an equitable defence only to the extent of the $18,000 which Shanmugan received under the latter arrangement. This latter result has been, in fact, achieved by the order of the Court made by consent of the parties though not relevant to the pleadings. It seems, however, to their Lordships that the issue of fraud on which it depends, has never been regularly tried. It was only introduced by the pleading delivered by the third-party and he was discharged from the action without being called upon to support his allegations, on the ground that the third-party procedure was inapplicable. The issue is, however, relevantly raised in the action now pending in India, and, under the circumstances, the proper order in the present suit is that execution (except for costs and the amount of any expenses properly incurred by the plaintiff and his predecessor as administrators *de bonis non*), be stayed until the suit in India has been determined. The widow being dead and the daughters now apparently married, it appears *prima facie* that Shanmugan is the only person interested. The order must provide that the stay will become perpetual failing due prosecution of the litigation in India and there must be liberty to apply.

With regard to the enquiry directed by the order of the Court of Appeal to ascertain the highest value reached by a share in the L.W.H., Ltd., it appears from the written judgments delivered, that it was left to be determined upon further consideration before a single judge whether the respondent could elect to take the value of the shares instead of the shares themselves and how that value was to be estimated. Their Lordships understand this question has been determined on further consideration and on appeal by the Court of Appeal. These orders are not before their Lordships in this appeal.

Their Lordships will duly advise His Majesty that the appeal be dismissed subject to a variation of the order of the Court of Appeal by the introduction of a stay of execution as already described.

There will be no order as to the costs of the appeal.

Judgment of Court of Appeal varied accordingly.

Solicitors for the Appellant—*Lowe & Co.*, agents for *Rodyk & Davidson*, Singapore.

Solicitors for the Respondent—*Peacock & Goddard*, agents for *Braddell Brothers*, Singapore.

[APPELLATE CIVIL JURISDICTION]

MILLS, J.

December 22, 1934.

R. PONNUSAMY v. LIM KEE LAM.

[SINGAPORE DISTRICT COURT APPEAL No. 11 of 1934]

Civil Procedure Code, S. 1239—District Court Appeal—Jurisdiction of single Judge to dismiss such an appeal in default of filing of copies of the record.

A Single Judge of the Supreme Court has no jurisdiction to dismiss an appeal from the District Court even though the Appellant has not complied with the requirements of S. 1239 of the Civil Procedure Code, as such an order of dismissal involves the decision of the appeal within the meaning of S. 1150 (1) of the Code.

MOTION

The facts and arguments sufficiently appear from the Judgment.

Shunmugam for Plaintiff (Respondent)

Fung for the Defendant (Appellant)

Cur. Ad. Vult.

MILLS, J.—The appellant having failed to file his two copies within the time prescribed by Section 1239 (1) of the Civil Procedure Code, the respondent now moves the Supreme Court to dismiss the appeal.

Counsel for the respondent argued that under Section 1239 (3) "the appeal shall be dismissed" and that a Judge of the Supreme Court sitting in open Court has jurisdiction to dismiss it.

Counsel for the respondent argued that the appeal ought to be put in the list, called on, and dismissed by the Court of Appeal in the ordinary way.

No authority was cited in support of either argument.

In my opinion, both contentions are wrong.

As to the respondent's contention: the only possible inference to be drawn from Section 1239 (4), in my opinion, is that until the copies for the use of the Judges have been filed, the appeal is not to be put in the list: so that, in the present instance, the case would never come before the Court of Appeal in the ordinary way.

As to the appellant's contention: there are three reasons why I feel compelled to hold that